TIC TECHNOLOGIES SDN BHD (IN LIQUIDATION) v. MOHAMAD SUHAIMI MOHAMED TAIB & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[ORIGINATING SUMMONS NO: WA-24NCC-398-09-2017]
16 APRIL 2019

COMPANY LAW: *Winding up – Petition – Disposition of property – Transfer of land belonging to company – Transfer of property and creation of bank's charge over land occurred after commencement of winding up of company – Whether court ought to exercise its discretion to affirm or validate sale of land – Whether transaction beneficial to general body of creditors of company – Whether just and fair to allow transaction to stand – Companies Act 1965, s. 223*

LAND LAW: *Indefeasibility of title and interests – Sale and purchase of land – Disposition of property – Transfer of land belonging to company – Transfer of property and creation of bank's charge over land occurred after commencement of winding up of company – Whether disposition of property validated – Whether interests of bank as chargee permitted to remain on basis it was subsequent purchaser in good faith and for valuable consideration – Whether bank obtained indefeasible interest pursuant to s. 340(3) of National Land Code*

CIVIL PROCEDURE: *Striking out – Application for – Case against company director for breach of duties – Whether cause of action sufficiently pleaded in originating summons – Whether originating summons need to specify reliefs sought and provide sufficient particulars – Whether case disclosed no reasonable cause of action – Whether striking out application ought to be allowed – Rules of Court 2012, O. 18 r. 19(1)(a)*

The liquidator of the company commenced this originating summons, pursuant to s. 223 of the Companies Act 1965 to, among others, avoid a transfer of land belonging to the company. The background facts were that the fourth defendant, Rubicon Assets Sdn Bhd ('Rubicon'), had earlier entered into a sale and purchase agreement with the company on 22 January 2014 ('the SPA') to purchase the company's factory premises at RM15,800,000. By 14 August 2014, Rubicon had paid the full purchase price for the subject property and was registered as the proprietor of the subject property on 27 October 2014. Crucially, on 14 October 2014, a search had been conducted over the company with the Companies Commission, the results of which showed that the company had not been wound up. This search was clearly erroneous, as an order had been granted on 1 October 2014 for the company to be wound up. The company was deemed to have been wound up on 18 June 2014, the date on which the winding-up petition was presented. The acquisition of the subject property by Rubicon was financed by the fifth defendant, CIMB Bank Berhad

('CIMB'). The subject property was charged to CIMB for the purposes of the loan granted to Rubicon. On 27 October 2014, CIMB's interests as chargee of the property was recorded on the register of titles. Thus, both the transfer of the property and the creation of CIMB's charge over the property occurred after the commencement of the winding-up of the company. Rubicon submitted that it did not know at the time of the transfer of the property that the company had already been wound up. The plaintiff, however, contended that CIMB knew or ought to have known that the company was insolvent from its previous dealings with the company and by virtue of the fact that it had previously appointed a receiver and manager over its assets. The first, second and third defendants were the directors of the company. The first and second defendants had been adjudicated bankrupt, and did not offer any submissions to oppose the application by the liquidator. The third defendant, Mohammad Redha ('Redha') maintained that the company had been run by the other two directors without his knowledge or involvement. The liquidator, through the company, sought for, *inter alia* (i) a declaration that the SPA and subsequent transfer of the subject land to Rubicon was null, void and of no legal effect by virtue of s. 223 of the Companies Act 1965; (ii) a declaration that the charge registered in favour of CIMB was equally null, void and of no legal effect; and (iii) damages against all the defendants for wrongful disposition of the land. *Via* encl. 24, Rubicon applied for the transaction to be validated pursuant to the provisions of s. 223 of the Companies Act 1965 while *via* encl. 17, Redha sought to strike out the company's action against him on the basis that it disclosed no reasonable cause of action.

Held (allowing encl. 24 & 17):

(1) The company was wound up before it received the purchase price of the subject property in full. Accordingly, the company could not be said to have divested its beneficial interest in the subject property before the commencement of its winding up. Therefore, the disposition of the subject property by the company to Rubicon was in contravention of s. 223 of the Companies Act 1965. Accordingly, the SPA was *prima facie* void and hence the title of Rubicon was defeasible under s. 340(2) of the National Land Code ('NLC'). Nevertheless, the next question was whether the circumstances of the case were such that the court ought to exercise its discretion to nonetheless affirm or validate the sale of the land. There were two considerations to be taken into account: whether the transaction could be said to be beneficial to the general body of the creditors of the company in question, and whether it would be just and fair to allow the transaction to stand. (paras 14, 24, 30 & 32)

(2) This court was satisfied that none of the directors or other officers of Rubicon had any knowledge, actual or constructive, of the fact that the company had been wound up at the time of the registration of Rubicon

as proprietor. The key fact was that the insolvency and company searches did not disclose the fact that the company had been wound up. Rubicon had done all that could be reasonably expected of a prudent purchaser in the circumstances. (para 33)

(3) The transaction was beneficial to the general body of creditors in the sense that it would have made more money available for the distribution to the creditors. That the first and second defendants had instead diverted the funds was no fault of Rubicon and ought not to taint the transaction itself. Rubicon was a *bona fide* purchaser, which meant that the transaction was transacted at a price at which the market would bear. A purchaser would be well entitled to strike a good bargain for itself in circumstances where it knew that the seller was in a need to realise its assets. There was no taint to take advantage of a counterparty's strained financial circumstances, for so long as the purchaser had no knowledge that the counterparty had been wound up. (para 33)

(4) The balance of justice lay with granting the order for validation. This court had weighed the interests of the creditors against those of Rubicon. Out of the RM15.8 million paid, approximately RM5.4 million was used to repay a loan owed by the company to Malaysian Industrial Development Finance Berhad. The company thus benefited by reason of the reduction in its liability, as some money went towards reducing the overall debt of the company to its creditors. Thus, the creditors accrued some benefit out of the transaction, even if the transaction may not have been done at an optimal price for the company. On the other hand, to deny the order for validation would leave a *bona fide* purchaser empty handed. The fact that the sale had been conducted at a price that was below the value assessed did not give rise to any legal or even moral culpability or turpitude on the part of the purchaser. (paras 33 & 35)

(5) Since the disposition of the subject property to Rubicon had been validated, the interests of CIMB as chargee should also be permitted to remain. CIMB need not itself make an application for validation, as its rights were derived not as consequence of any disposition by the company of any of its properties, but rather were derived from Rubicon as chargor. The rights of CIMB as chargee did not come within the operation of s. 223 of the Companies Act 1965. CIMB's rights, title and interest as chargee over the subject property ought nonetheless remain on the basis that it was a subsequent purchaser in good faith and for valuable consideration, and as a consequence obtained an indefeasible interest in the subject property pursuant to the proviso to s. 340(3) of the NLC. (paras 51 & 52)

(6) CIMB had carried out all the steps that a reasonably prudent financier and proposed chargee ought to have taken in the circumstances. These were the ordinary precautions that a purchaser or chargee ought to have taken in the circumstances. The mere knowledge on the part of CIMB

A that the company had previously failed to adhere to the terms of a repayment obligation and that the company was facing financial difficulties was insufficient to vitiate good faith, particularly when the loan obligations of the company had been fully settled prior to the sale and purchase of the subject land entered into. (paras 45 & 48)

B **(7)** In connection with the striking out application by Redha, it was argued that the plaintiff's case disclosed no reasonable cause of action, and so ought to be struck out pursuant to O. 18 r. 19(1)(a) of the Rules of Court 2012. The present case was commenced by way of originating summons; there was thus no statement of claim or reply to the defence. This, C however, did not absolve the plaintiff from the requirement to ensure that its cause of action against a defendant had been sufficiently pleaded in the originating summons itself. Not only does an originating summons need to specify the reliefs sought, but it must also provide sufficient particulars in order that the cause of action relied upon was D sufficiently identified. Having reviewed the terms of the originating summons herein, the originating summons itself did not identify or express any cause of action against Redha. Nowhere in the summons was breach of directors' duties, whether under statute or at common law, mentioned. Thus, this court allowed Redha's striking out application and the company's claim against Redha was dismissed with costs. E (paras 57, 58, 60, 65 & 68)

Case(s) referred to:

CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 FC ***(refd)***

Engtex Marketing Sdn Bhd v. Zinma Housing Development Sdn Bhd & Anor [2009] 5 CLJ 759 HC ***(refd)*** F

Ernest Cheong Yong Yin v. Mohammed Jamal Inche IM Salleh & Ors; Tetuan Mah-Kamariyah & Partners (Intervener) [2014] 1 CLJ 1026 CA ***(refd)***

Isyoda (M) Sdn Bhd v. Low Seong Tek [2000] 4 CLJ 621 HC ***(refd)***

Lee Eng Eow v. Mary Lee & Anor [1999] 3 CLJ 143 CA ***(refd)***

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)*** G

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***

Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC ***(refd)***

Md Zubir Hamid & Ors v. Zahari Salleh & Ors [2018] 10 CLJ 571 CA ***(refd)***

Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***

H *Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC* ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram [1998] 1 CLJ 1035 CA ***(refd)***

Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals [2013] 3 CLJ 969 FC ***(refd)***

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Legislation referred to:
Companies Act 1965, s. 223
National Land Code, s. 340(2)(b), (c), (3)
Rules of Court 2012, O. 7 r. 3(1), O. 18 r. 19(1)(a)
Rules of the High Court 1980, O. 7 r. 3(1)

For the plaintiff - S Bhuvaneswary; M/s Bhuvanes
For the 3rd defendant - Azam Rashid; M/s Azam Rashid & Co
For the 4th defendant - Kalearasu K. Veloo; M/s SF Chan & Co
For the 5th defendant - Jeyathini Kannaperan; M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The liquidator of TIC Technologies Sdn Bhd (the "company") commenced this originating summons to, among others, avoid a transfer of land belonging to the company. The application was made under and pursuant to s. 223 of the Companies Act 1965.

Background Facts

[2] The material facts that are determinative in this originating summons are set out in the following paragraphs. In the course of submissions, counsel traversed a vast minutiae of facts, allegations, counter-allegations and refutations. In analysing the issues in this case, I have attempted to cut a swathe through this morass, and summarise below the facts and contentions that are, in my judgment, relevant for disposal of the case on its merits.

[3] An order for the winding of the company was granted on 1 October 2014, pursuant to a winding-up petition presented on 18 June 2014 on grounds that the company was unable to pay its debts.

[4] Rubicon Assets Sdn Bhd ("Rubicon"), the fourth defendant in this action, had earlier entered into a sale and purchase agreement with the company on 22 January 2014 (the "SPA") to purchase the company's factory premises in Shah Alam. The purchase price was RM15,800,000.

[5] By 14 August 2014, Rubicon had paid the full purchase price for the subject property. Rubicon was registered as the proprietor of the subject property on 27 October 2014.

[6] Crucially, on 14 October 2014, a search had been conducted over the company with the Companies Commission, the results of which showed that the company had not been wound up. This search result was clearly erroneous, as an order had been granted on 1 October 2014 for the company

A to be wound up. Due to the provisions of the Companies Act 1965 applicable at the material time, the company was deemed to have been wound up on 18 June 2014, the date on which the winding-up petition was presented.

[7] The acquisition of the subject property by Rubicon was to have been financed by CIMB Bank Berhad ("CIMB"), the fifth defendant in this action. The subject property was charged to CIMB for the purposes of the loan granted to Rubicon. On 27 October 2014, CIMB's interests as chargee of the property was recorded on the register of titles.

[8] Thus, both the transfer of the property and the creation of CIMB's charge over the property occurred after the commencement of the winding up of the company. According to the affidavit evidence deposed on behalf of Rubicon, it did not know at the time of the transfer of the property that the company had already been wound up. While the plaintiff was not able to offer any evidence to refute this, it contended that CIMB knew or ought to have known that the company was insolvent from its previous dealings with the company and by virtue of the fact that it had previously appointed a receiver and manager over its assets.

[9] The first, second and third defendants are the directors of the company. The first and second defendants have been adjudicated bankrupt, and did not offer any submissions to oppose the application by the liquidator. I accordingly entered judgment against them.

[10] The third defendant, En Mohamad Redha bin Abd Shukor, is the brother of the second defendant. He maintained that the company had been run by the other two directors without his knowledge or involvement.

The Applications Before The Court

[11] The liquidator, through the company, sought for, *inter alia*:

(a) a declaration that the SPA and subsequent transfer of the subject land to Rubicon was null, void and of no legal effect by virtue of s. 223 of the Companies Act 1965;

(b) a declaration that the charge registered in favour of CIMB was equally null, void and of no legal effect; and

(c) damages against all the defendants for wrongful disposition of the land.

[12] Rubicon applied in encl. 24 for the transaction to be validated pursuant to the provisions of s. 223 of the Companies Act 1965.

[13] En Redha, the third defendant, sought in encl. 17 to strike out the company's action against him on the basis that it disclosed no reasonable cause of action.

Rubicon's Position

[14] I found that the disposition of the subject property by the company to Rubicon was in contravention of s. 223 of the Companies Act 1965. Accordingly, the SPA was *prima facie* void, and hence the title of Rubicon was defeasible under s. 340(2)(c) of the National Land Code. Nevertheless, I allowed the application by Rubicon for the transaction to be validated, as I considered that it was just and fair for the transaction to be validated. This is explained in the following paragraphs.

[15] Section 223 of the Companies Act 1965 provided as follows:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[16] The objective facts of this case establishes beyond peradventure that the registration of Rubicon as the proprietor of the subject land occurred not only after the commencement of winding up (which is deemed to relate back to the date of presentation of the winding up petition) but also after the date on which the winding up order was actually granted by the winding up court.

[17] In the case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors*[1], the Supreme Court was of the view that the disposition of property occurred when an instrument of transfer was registered under the National Land Code, and not when it was executed by the parties. In that case, the three affected transfers were presented to the Land Office for registration after the commencement of winding up. As a result, s. 223 applied to render void the transfers. Seah SCJ held:

> When the learned judge exercised the discretionary power contained in section 223 of the Companies Act 1965 to validate the dispositions made after the commencement of the winding up proceeding, he appeared to have done so on the footing that section 53(1) of the Bankruptcy Act 1967 (as amended) read with section 293(1) of the Companies Act 1965 did not apply. I disagreed with the learned judge on this and I have answered that the transfers of the first, second and third portions of the estate to the first respondent were fraudulent preferences and therefore void as against the second appellant. Unlike section 223 of the 1965 Act, the court has no power to make any validation order under section 53 of the 1967 Act. It seems to be the practice of the courts in England that when a transfer had been held to be a fraudulent preference and therefore void as against the Official Assignee under section 44(1) of the English Bankruptcy Act 1914 the court would be reluctant to exercise its discretionary power contained in section 227 of the English Companies Act 1948 and validate the void transfer because to do so would prejudice the right of the body of general creditors of the insolvent company.

A I have given careful consideration to the submissions of learned counsel for the second appellant as well as the first respondent and I have also taken into account the facts of this case. In my judgment, I should adopt the practice of the courts in England that no validation order would be made if the transfer was proved to be a fraudulent preference and therefore void as against the Official Assignee under section 53(1) of the
B Bankruptcy Act 1967 (as amended). For the above reasons, I set aside the validation order made by the learned judge pursuant to section 223 of the Companies Act 1965.

[18] In the case of *Ernest Cheong Yong Yin v. Mohammed Jamal Inche IM Salleh & Ors; Tetuan Mah-Kamariyah & Partners (Intervener)*[2], the plaintiff was
C a chartered surveyor who was owed money by a company known as KM Engineering & Development Sdn Bhd. On 27 September 2003, KM Engineering entered into a sale and purchase agreement to sell a house located at 74 Jalan Keramat Hujung to one En Mohammed Jamal. En Jamal sought financing from Citibank. On 7 February 1994, the duly executed
D forms of transfer and charge were presented by Citibank's solicitors to Pejabat Tanah dan Galian, Wilayah Persekutuan. The solicitors were informed that the matter was outside the administration of Pejabat Tanah dan Galian, Wilayah Persekutuan, as a result of which the forms were re-presented to the Pejabat Tanah Daerah Gombak on the same day. By
E 28 February 1994, the purchase price for the house had been fully paid, and vacant possession was given to En Jamal.

[19] A petition to wind up KM Engineering was presented on 23 February 1998, which petition was allowed on 10 June 1998.

F **[20]** In the meantime, on 21 May 1998, Citibank's solicitors were informed by the Pejabat Tanah Daerah Gombak that the presentations of the relevant instruments of transfer and charge had been rejected as the subject land was within the jurisdiction or administration of the of Pejabat Tanah dan Galian, Wilayah Persekutuan. It was not until 14 August 2001 that the relevant forms of transfer and charge were presented to the correct land office
G and En Jamal registered as the proprietor of the house.

[21] The plaintiff in that case sought for an order to declare the dealings in the property to En Jamal and Citibank void under s. 223 of the Companies Act 1965. From the facts, it was apparent that actual registration of the transfer and charge occurred well after KM Engineering was wound up, even
H though the relevant forms had been presented to both the land offices before the date of winding up.

[22] The Court of Appeal dismissed the plaintiff's action, affirming the decision of the High Court. It found that, by the effective date of the winding
I up, the company had divested its beneficial interest in the property, and thus the registration of the memorandum of transfer did not amount to a disposition of the property in question. Ramly Ali JCA (as His Lordship then was) stated:

> [51] Based on the above authorities, we are fully satisfied that the sale transaction of the property in question from the second respondent (as vendor) to the first respondent (as purchaser) was effectively completed and concluded before the commencement of the winding-up petition against the second respondent (ie, when the sale and purchase agreement and the respective Forms 14A and 16A were executed on 27 September 1993, full purchase price paid on 7 February 1994 and vacant possession handed to the purchaser on 28 February 1994). Therefore such transaction does not amount to a "disposition of the property of the company" as stipulated under s. 223 of the Companies Act 1965. The transaction does not contravene s. 223; and therefore must be held to be valid. That being the case the issue of obtaining a validation order from the court as contended by the appellant does not arise. We must stress it here that a validation order for the disposition is only applicable and required when the said disposition or sale was carried out after the commencement of the winding-up petition and void in contravention of s. 223 of the Companies Act 1965, but not in the present case. Therefore the appellant's argument that the sale of the property was invalid for failure to obtain a validation order from the court holds no water.

[23] The *ratio decidendi* in *Ernest Cheong Yong Yin v. Mohammed Jamal Inche IM Salleh* was that, if the company in question had divested of its beneficial interest in the land in question prior to the winding up of the company, then s. 223 cannot apply to defeat the transaction in question. This is the case even though actual registration of the transfer took place after the commencement of winding up. The key question was therefore: when is a company taken to have divested itself of its beneficial interest in the property in question? In my view, based on the decision of the Court of Appeal in *Ernest Cheong Yong Yin v. Mohammed Jamal Inche IM Salleh*, this occurs when the purchaser has tendered and the company has received the full purchase price for the property. Once full purchase price has been paid, the seller stands as a bare trustee of the property for the benefit of the buyer and chargee (if any): see, for example, *Macon Engineers Sdn Bhd v. Goh Hooi Yin*[3].

[24] By contrast, in the present case, the company was wound up before it received the purchase price of the subject property in full. The winding up of the company commenced on 18 June 2014, which was the date on which the petition for its winding up was presented to court. Rubicon only fully paid the purchase price on 14 August 2014, which was after the commencement of winding up. Accordingly, the company could not be said to have divested its beneficial interest in the subject property before the commencement of its winding up.

[25] The High Court case of *Engtex Marketing Sdn Bhd v. Zinma Housing Development Sdn Bhd & Anor*[4] was cited in the course of submissions for the proposition that the time of disposition for the purposes of s. 223 was the date on which the transaction in question was entered into (and not, as held by

A the supreme Court in *Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Sdn Bhd*, the time of registration of the dealings in the land). I found myself unable to agree with this submission for the following reasons:

(i) the decision of the High Court in *Engtex Marketing v. Zinma Housing Development* had been overruled by the Court of Appeal in its decision B delivered on 2 June 2010, although no written grounds have been provided; and

(ii) reliance had been placed by the High Court in *Engtex Marketing v Zinma Housing Development* on the case of *Ong Ban Chai & Ors v. Seah Siang Mong*[5]. However, the Federal Court in the recent case of *Liputan Simfoni* C *Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd*[6] held that *Ong Ban Chai v. Seah Siang Mong* was incorrectly decided.

[26] The next question to be decided was, what was the effect of a transaction being rendered void pursuant to s. 223 of the Companies Act D 1965, where the transaction in question was a dealing in real property and where the instrument of dealing had been duly presented and registered. Put another way, does the avoidance of a disposition of real property by a company pursuant to s. 223 of the Companies Act 1965 have the automatic effect of defeating the title of the purchaser and any subsequent purchaser?

E **[27]** This very point was considered by the Supreme Court in *Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Sdn Bhd*, which was case of sufficient importance that all three Supreme Court Judges presiding in that case delivered judgments. The short answer is that the title or interest of a purchaser and any person to whom such title or interest may have been F subsequently transferred is only defeasible pursuant to s. 340 of the National Land Code. Syed Agil Barakbah SCJ held:

> In my considered judgment, the transfer of the estate to the first respondent cannot be set aside without resorting to section 340 of the Code and alleging fraud, misrepresentation or the like under subsection G (2) thereof in order to defeat the indefeasibility of title of the first respondent by virtue of having obtained the right *in rem* in the estate as the registered owner at the material time. Fraud must not only be pleaded but also particularised in the pleadings. Fraud under the Code means actual and not constructive or equitable fraud. Actual fraud must be proved in order to deprive a purchaser for value of the absolute title H conferred by the Code. Actual fraud means dishonesty of some sort proved against the person whose registered title is impeached, or his agents. *Bona fide* mistake or negligence is not fraud and each case must depend on its own particular circumstances. The equitable doctrine of constructive fraud has no application under the provisions of the Code. This is the view adopted by our courts based on the decision in *Waimiha* I *Sawmilling Co Ltd v. Waione Timber Co Ltd* [1926] AC 101, which followed *Assets Co Ltd v. Mere Roihi* [1905] AC 176.

[28] In the case of *Md Zubir Hamid & Ors v. Zahari Salleh & Ors*[7], the administrator of an estate sold land without the permission of the court, as required under the Probate and Administration Act 1959. The sale of the property was thus null and void. Following *Samuel Naik Siang Ting v. Public Bank Bhd*[8], the form of transfer was also a void instrument, rendering the title of the purchaser defeasible pursuant to s. 340(2)(b) of the National Land Code.

[29] By dint of the same logic, if the SPA by which the company sold the land to Rubicon is void, it would follow that the Form 14A in respect of the transfer of title would be similarly void, and the title of Rubicon would be defeasible pursuant to s. 340(2)(b).

[30] The preceding paragraphs establish that the transfer of the subject property to Rubicon is *prima facie* void. The next question is whether the circumstances of the case are such that the court ought to exercise its discretion to nonetheless affirm or validate the sale of the land.

Validation

[31] The applicable principles for validation are explained in the Federal Court decision in *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals*[9]:

> [13] It is to be noted that s. 223 of the Act makes no mention as to time. It is our view validation can be made by the court at any time. We are in agreement with the submission of learned counsel for the appellants that to insist that the purchasers must have applied for a validation after the company was wound up, there must be knowledge. Here the purchasers had no knowledge at all of the winding up order at the material time. It is also noted that the Act does not prescribe as to how the discretion under s. 223 of the Act is to be exercised. However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and even after a winding order has been granted based on two broad considerations:
>
> (a) if the transaction(s) are beneficial to the general body of creditors; or
>
> (b) if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned.
>
> [14] The general rule in s. 223 of the Act is that it does not shut out *bona fide* transactions. In *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44;; [1988] 2 MLJ 449, Seah, SCJ made reference to a passage by Vaisey J in *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 which states:
>
> > that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.
> >
> > The discretion is an unfettered one.

[32] There are thus two considerations to be taken into account by the court: whether the transaction could be said to be beneficial to the general body of the creditors of the company in question, and whether it would be just and fair to allow the transaction to stand. Fulfilment of either one of these conditions would suffice.

[33] On the facts of the present case, I found both these conditions to have been fulfilled. I accordingly granted an order for the validation of the sale and purchase of the subject land. The reasons for my decision are as follows:

(a) on the facts, I was satisfied that none of the directors or other officers of Rubicon had any knowledge, actual or constructive, of the fact that the Company had been wound up at the time of the registration of Rubicon as proprietor. The key fact were the insolvency and company searches that did not disclose the fact that the company had been wound up. Rubicon, in my view, had done all that could be reasonably expected of a prudent purchaser in the circumstances;

(b) the transaction was, in my view, beneficial to the general body of creditors in the sense that it would have made more money available for distribution to the creditors. That the first and second defendants had instead diverted the funds is no fault of the Rubicon, and ought not taint the transaction itself.

The company may or may not have been able to obtain more money for the property, but there is no assurance of any particular outcome. The fact remains that, on the facts, I have found the purchaser, Rubicon to be a *bona fide* purchaser. The fact that it is *bona fide* purchaser would itself have meant that the transaction was transacted at a price at which the market would bear. The market price is the price at which a sale can be conducted between parties at arm's length on a willing seller and a willing buyer basis. A purchaser would be well entitled to strike a good bargain for itself in circumstances where it knows that the seller is in a need to realise its assets. There was no taint to take advantage of a counterparty's strained financial circumstances, for so long as the purchaser has no knowledge that the counterparty has been wound up.

The company may well have been able to obtain more money for the property had not been forced to undertake a sale in constrained financial circumstances. The fact of the matter is that real estate prices fluctuate even if they may trend upwards in the long run. There is no assurance that, given the same circumstances, a liquidator would be able to obtain a better price for the property;

(c) I was of the view that the balance of justice lay with granting the order for validation. In coming to this determination, I weighed the interests of the creditors against those of Rubicon. Out of the RM15.8 million

paid, approximately RM5.4 million was used to repay a loan owed by the company to Malaysian Industrial Development Finance Berhad ("MIDF"). The company thus benefited by reason of the reduction in its liability, as some money went towards reducing the overall debt of the company to its creditors. Thus the creditors accrued some benefit out of the transaction, even if the transaction may not have been done at an optimal price for the company. On the other hand, to deny the order for validation would leave a *bona fide* purchaser empty-handed.

[34] Learned counsel for the plaintiff sought to argue that the company had sold the subject land for a price that was substantially less than its market value at the time in question. It was pointed out, for the purposes of stamp duty on the conveyance of the land, the Stamp Office had attributed a value of RM18,000,000 to the land at 23 July 2014. In addition, a firm of valuers had valued the land at RM22,700,000 and RM24,070,000 as at 8 January 2009 and 14 March 2011 respectively.

[35] As mentioned above, a purchaser would be well entitled to take advantage of a seller's strained financial circumstances in order to obtain a good bargain for itself. The fact that the sale had been conducted at a price that was below the value assessed by the stamp office does not, in my view, give rise to any legal or even moral culpability or turpitude on the part of the purchaser.

[36] In addition, I was also of the view that it is entirely possible for the value of land to fluctuate in the shorter term, even though the general trend for the value of landed property could reasonably be expected to rise over time. The fluctuations in the value of assets generally would fluctuate in the shorter term by reason of supply and demand, linked to the general state of the economy of the country as whole. Thus, in times of economic downturn, the prices of land could well decline, as financiers foreclose on assets that have been charged as security, causing more assets of a similar nature to be generally available for sale in the market. In other words, even though there was no reason for me to doubt the valuation provided by the valuer in 2009 and 2011, these valuations of themselves were insufficient for me to arrive at a conclusion that the price of RM15,800,000 agreed to be paid by Rubicon in January 2014 amounted to a significant undervalue to the prevailing market price at that time as would lead me to the conclusion that the transaction in question was detrimental to the general body of the creditors of the company or that it would not be just or fair to allow the transaction to stand.

[37] Crucially, I note that it would have been possible for the liquidator to have engaged a firm of valuers to provide a valuation of the subject land as at the same date as the transaction entered into between the company and Rubicon. Had the liquidator done so, it may well have provided further evidence to bolster the contentions of counsel for the plaintiff.

[38] The fact that the winding up petition presented against the company had been advertised and gazetted does not operate as constructive notice against Rubicon. If this were the case, then it would mean that *Wong Wee Keong v Daya Bersama* was wrongly decided, a proposition that I am not able to accept. It will be recalled that in *Wong Wee Keong v. Daya Bersama*, the advertisement and gazette in respect of the winding up proceedings had taken place some three years prior to the transaction under challenge. Yet the Federal Court nonetheless still allowed the appeal and ordered the transaction to be validated.

CIMB'S Position

[39] As I have allowed the application by Rubicon for the transaction to be validated, it would follow as a necessary consequence that CIMB's position as chargee of the subject land would remain unaffected. Once I have validated the sale of the subject property to Rubicon, it means that the company no longer has any interest over the land in question. CIMB's interest in the land as chargee should therefore also be permitted to subsist.

[40] Even if I had come to the contrary conclusion and declared the transaction void as being in contravention with s. 223 of the Companies Act 1965, CIMB has satisfied me that it was a purchaser in good faith and for valuable consideration within the meaning of s. 340(3) of the National Land Code, and has therefore acquired an indefeasible interest in the subject land.

[41] In the Federal Court decision of *CIMB Bank Bhd v. AmBank (M) Bhd & Ors*[10], AmBank, as the chargee of the property in question, was held to be a subsequent purchaser of the land for the purposes of s. 340 of the National Land Code, because AmBank derived its interest in the land from the charge that was executed by the chargor. AmBank was thus able to obtain an indefeasible interest in the land if it was able to establish *bona fides*. This was despite the fact that the registration of the purchaser had been obtained by forgery.

[42] By the same logic, CIMB in the present case will be taken to be a subsequent transferee of an interest in the land, as it acquired its interest from Rubicon, as the chargor of the land. A subsequent transferee may obtain indefeasible title pursuant to s. 340(3) of the National Land Code if it is a purchaser in good faith and for valuable consideration, notwithstanding the fact that the title of the chargor may be defeasible.

[43] The burden of proof of establishing that it was a *bona fide* purchaser lay with CIMB as the party asserting *bona fides*: see *Ong Chat Pang & Anor v. Valliappa Chettiar*[11]. The test to be satisfied by the person seeking to assert that it was a purchaser in good faith and for valuable consideration is set out in the following terms by the Federal Court in *Liputan Simfoni v. Pembangunan Orkid Desa Sdn Bhd*:

> [I]n order to discharge the burden of showing that it is a purchaser in good faith and for valuable consideration, the purchaser must not only show the absence of fraud, deceit or dishonesty but also that it had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances. The question of whether a purchaser has acted as a reasonably prudent purchaser or not would have to be decided on the particular facts of each case.

[44] In this particular case, CIMB had engaged solicitors to act for it in connection with the financing exercise. The solicitors had undertaken a search with the Department of Insolvency on 20 June 2014, the results of which showed that the company was not wound up[12]. The solicitors also completed a detailed drawdown checklist in a format that appears to have been prescribed by CIMB. It was only upon the advice of the solicitors that CIMB disbursed the loan amount to MIDF (in order to redeem MIDF's charge over the subject property) and to Rubicon.

[45] In my view, CIMB had carried out all the steps that a reasonably prudent financier and proposed chargee ought to have taken in the circumstances. These are the ordinary precautions that a purchaser or chargee ought to have taken in the circumstances. I was therefore satisfied that CIMB had established its *bona fides*, and therefore could validly rely on s. 340(3) of the National Land Code to acquire an indefeasible interest in the subject property.

[46] Much was made by counsel for the plaintiff that CIMB had previously been a lender to the company, and had appointed a receiver and manager over the assets of the company. It was thus argued that CIMB knew or ought to have known that the company was at the material time insolvent, which was sufficient to vitiate good faith on the part of CIMB.

[47] For its part, CIMB did not deny having been a lender to the company. Its loan was, however, fully repaid by 22 October 2013[13], as a consequence of which the receiver and manager was discharged.

[48] In my view, mere knowledge on the part of CIMB that the company had previously failed to adhere to the terms of a repayment obligation and that the company was facing financial difficulties was insufficient to vitiate good faith, particularly when the loan obligations of the company had been fully settled prior to the sale and purchase of the subject land was entered into.

[49] The proposition by counsel for plaintiff – that knowledge by CIMB of the company's prior straitened circumstances would vitiate good faith – would in my respectful view place too onerous a duty on financiers. The practical effect would be to require financiers to not only undertake a credit evaluation over a borrower but also in respect of a proposed vendor. This is a departure from commercial practice and realities that I was not prepared to accept.

[50] It was also pointed out by counsel for the plaintiff that that the facilities agreement between CIMB and Rubicon contained a condition precedent that a valuation be delivered to CIMB confirming that the estimated market value of the land was not less than RM24 million[14]. I am of the view that no legal particular consequence arose from this fact. As explained in the preceding paragraphs, all that CIMB needs to show in order to establish *bona fides* was that it had not acted fraudulently, deceitfully or dishonestly, and that it had taken the ordinary precautions that a reasonably prudent chargee would have taken in the circumstances. The fact that this condition was set out as a condition precedent indicates that CIMB was concerned about the realisable value of its security. It would not be unusual for bank to have an internal limit imposed on financing that is expressed as a portion of the security value. Indeed, it would be unusual and imprudent for a bank to lend more than the realisable value of its security. In addition, the estimated market value of a property can reasonably be expected to be higher than the value recoverable upon realisation of a security. I was not satisfied that, by the mere reason of the inclusion of this term in the condition precedent to the financing, good faith on the part of CIMB was somehow vitiated.

[51] To summarise the position with respect to CIMB: as I have determined that the disposition of the subject property to Rubicon ought to be validated, the interests of CIMB as chargee should also be permitted to remain. CIMB need not itself make an application for validation, as its rights are derived not as consequence of any disposition by the company of any of its properties, but rather are derived from Rubicon as chargor. The rights of CIMB as chargee does not come within the operation of s. 223 of the Companies Act 1965, because, at the split second immediately prior to the creation of the charge, the subject property was no longer the property of the company.

[52] Even if I had come to the contrary finding – that the transaction ought not be validated – CIMB's rights, title and interest as chargee over the subject property ought nonetheless remain, on the basis that it was a subsequent purchaser in good faith and for valuable consideration, and as a consequence obtained an indefeasible interest in the subject property pursuant to the proviso to s. 340(3) of the National Land Code.

En Redha's Position

[53] In connection with the striking out application by En Redha in encl. 17, the first observation I would make at the outset is that, just because the transaction has been validated on application by Rubicon does not mean that there has not been any fraudulent preference or, as alleged by the company, misappropriation of the company's money by some of the directors.

[54] En Redha was, at all material times, a director of the company. The company's case against the directors was that they had breached their statutory and fiduciary duties as directors of the company in firstly, wrongfully disposing of the subject property, and secondly, in misappropriating or facilitating the misappropriation of the company's money.

[55] As previously mentioned, neither Suhaimi (the first defendant) nor Adrina (the second defendant) sought to oppose the company's action here, and hence I entered judgment against them.

[56] While En Redha did not deny that he was a director of the company at the material time, he contended that he did not play an active role in the management of the company and was not involved in the matters complained of by the liquidator. In my view, this in and of itself would not have been sufficient to amount to an adequate defence against a claim for breach of directors' duties.

[57] En Azam Rashid, counsel for En Redha, argued in support of the striking out application that the plaintiff's case disclosed no reasonable cause of action, and so ought to be struck out pursuant to O. 18 r. 19(1)(a) of the Rules of Court 2012. It is trite law that, in considering an application for striking out under this limb, no evidence may be considered; whether or not a cause of action has been disclosed must be determined by reference to the pleadings alone.

[58] Of course, the present case was commenced by way of originating summons; there is thus no statement of claim or reply to the defence. This, however, does not absolve a plaintiff from the requirement to ensure that its cause of action against a defendant has been sufficiently pleaded in the originating summons itself.

[59] Order 7 r. 3(1) of the Rules of Court 2012 provides as follows:

> 3.(1) Every originating summons shall include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

[60] Accordingly, not only does an originating summons need to specify the reliefs sought, but it must also provide sufficient particulars in order that the cause of action relied upon is sufficiently identified.

[61] Order 7 r. 3(1) of the previous Rules of the High Court 1980 (which is in *pari materia* with the present provisions under the Rules of Court 2012) was considered in the Court of Appeal case of *Lee Eng Eow v. Mary Lee & Anor*[15], where it was held:

A So that an originating summons is just like a pleading in a statement of claim, it must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. In other words, an originating summons, like a statement of claim, must disclose a cause of action (*Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd* [1996] 1 LNS 119;; [1997] 1 MLJ 409). Therefore, if the summons itself, as in the instant case, does not disclose any cause of action, it can be dismissed. : see *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89 at p 96 which is a decision of this court. The words 'cause of action' have been defined by Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232 at pp 242-243 as meaning 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'.

[62] The crucial question was thus whether the claim for breach of director's duties against En Redha had been adequately pleaded in the originating summons. It has to be remembered in this regard that the contents of any supporting affidavit cannot be taken into account, for the striking out application was premised upon O. 18 r. 19(1)(a).

[63] The originating summons in this case begins with the remedies sought against the defendants. These remedies run to 11 paragraphs. From them, it can be discerned that the plaintiff sought an order to declare the sale of the subject property void by virtue of s. 223 of the Companies Act 1965 (see para. 1), and that the defendants ought to be liable for damages on account of the wrongful dispossession, transfer and charge of the subject land (para. 10). No other cause of action was mentioned.

[64] The grounds upon which the originating summons was based were three, and they are reproduced *verbatim et literatim* below:

(a) Pemindahan dan Gadaian yang Dipertikaikan tidak sah dalam undang-undang menurut Seksyen 223 Akta Syarikat 1965 (bersamaan dengan seksyen 472(1) Akta Syarikat 2016) memandangkan Subjek Tanah telah dipindahkan daripada Plaintif kepada Defendan Ke-4 dan gadaian telah diwujudkan memihak kepada Defendan Ke-5 selepas pemfailan petisyen penggulungan terhadap Plaintif.

(b) Defendan Ke-4 dan Defendan Ke-5 mempunyai pengetahuan atau dikatakan ('deemed" mempunyai pengetahuan bahawa pada setiap masa Plaintif tidak solven secara komersial dengan petisyen penggulungan yang telah difailkan serta harga pembelian Subjek Tanah adalah di bawah harga pasaran semasa ('prevailing market price').

(c) Pemindahan dan Gadaian yang Dipertikaikan adalah untuk manfaat ('serve the purposes') Defendan-Defendan dan memudaratkan ('detrimental') Plaintif dan pemiutang-pemiutangnya.

[65] Having reviewed the terms of the originating summons carefully, I was constrained to agree with the submissions of En Azam. The originating summons itself did not identify or express any cause of action against En Redha. Nowhere in the summons was breach of directors' duties, whether under statute or at common law, mentioned.

[66] If the affidavits deposed in support of an originating summons clearly explain the cause of action that was being pursued, can they overcome the infirmity in the originating summons? They cannot, on the authority of *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram*[16], which, like *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v. Mary Lee (as executrix of the estate of Low Ah Lian)*, is also a decision of the Court of Appeal, and which therefore is binding on this court. Abdul Aziz J in the case of *Isyoda (M) Sdn Bhd v. Low Seong Tek*[17], dismissed the plaintiff's action in that case with some reluctance, explaining:

> In *Saraswathy Devi a/p Nadchatiram v. Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89, the plaintiff (the respondent in the appeal) had, by originating summons, applied for an order to enjoin the defendant, Saraswathy Devi, an advocate and solicitor, from acting for certain persons in certain proceedings but the originating summons did not show why the defendant should not act for those persons in those proceedings, although the affidavit in support of the originating summons did. The Court of Appeal nevertheless ruled at p. 952 that because of the said omission in the originating summons no cause of action was shown in it and that on that ground alone the originating summons ought to have been dismissed by the judge below.
>
> It is clear from the ruling that an originating summons that does not comply with O. 7 r. 3(1) of the RHC because it does not include sufficient particulars to identify the cause of action must be dismissed. It is also clear that where an injunction is sought by originating summons to restrain a certain act but the originating summons does not show why the act should be restrained, even though the affidavit in support does, then the originating summons has not included sufficient particulars to identify the cause of action in respect of which the plaintiff claims the relief of the injunction.
>
> In the present case, the originating summons does not contain sufficient particulars to identify the cause of action because it does not state why the defendant should be restrained from applying for a winding-up of the plaintiff company. Applying the ruling of the Court of Appeal, by which I am bound, I have to dismiss the originating summons.
>
> Learned counsel for the plaintiffs submits that the cause of action ought to be presumed as a matter of law, that is to say, that when an application is made to restrain the bringing of winding-up proceedings based on a demand under s. 218(2)(a) of the Act, it must be on the ground of abuse of process of court because the debt is *bona fide* disputed. I do not think that such a presumption is justified. There could be some other ground. In any case, O. 7 r. 3(1) of the RHC must be construed as requiring particulars identifying the cause of action to be expressly included.

> I have been most reluctant to uphold this ground and dismiss or strike out the originating summons on this ground because although the originating summons lacks particulars to identify the cause of action, the cause of action is easily identifiable from the affidavit in support of the application. But there is the requirement of O. 7 r. 3(1) of the RHC and the strict ruling in Saraswathy Devi which I think applies to the circumstances of the originating summons in this case, and I am bound by the ruling and the defendant is entitled to expect me to act according to the ruling. For that reason I have to dismiss the originating summons, which I do with costs.

[67] Like Abdul Aziz J, this court is also bound by the ruling of the Court of Appeal in *Saraswathy Devi*.

[68] For these reasons, I allowed En Redha's striking out application. The originating summons did not identify the plaintiff's cause of action against him, and hence ought to be struck out pursuant to O. 18 r. 19(1)(a) of the Rules of Court 2012. The company's claim against En Redha was dismissed with costs.

Endnotes:

1. [1988] 1 LNS 44, [1988] 2 MLJ 449
2. [2014] 1 CLJ 1026, [2014] 2 MLJ 404, [2014] 2 MLRA 277
3. [1976] 1 LNS 67, [1976] 2 MLJ 53 (FC)
4. [2009] 5 CLJ 759, [2009] 8 AMR 279, [2009] 1 MLRH 777
5. [1998] 3 CLJ 637, [1998] 3 AMR 2673, [1998] 3 MLJ 346, [1998] 1 MLRA 393
6. [2019] 1 CLJ 183. The Federal Court judgment in this case was delivered on 7 September 2018, some three weeks prior to the decision in the present case.
7. [2018] 10 CLJ 571, [2017] 6 AMR 769, [2017] 4 MLJ 351
8. [2015] 8 CLJ 944, [2018] 3 AMR 259, [2015] 6 MLJ 1, [2015] 5 MLRA 665
9. [2013] 3 CLJ 969, [2013] 3 AMR 93, [2013] 3 MLJ 313, [2013] 2 MLRA 657
10. [2017] 9 CLJ 145, [2017] 6 AMR 309, [2017] 5 MLJ 142, [2017] 5 MLRA 1
11. [1971] 1 LNS 96; [1971] 1 MLJ 224, [1971] 1 MLRA 828
12. See p. 358 of encl. 5
13. see exh. CIMB-10 at p. 359 of encl. 5
14. See p. 209 of encl. 5

15. [1999] 3 CLJ 143, [1999] 3 AMR 2885, [1999] 3 MLJ 481, [1999] 1 MLRA 302

16. [1998] 1 CLJ 1035, [1998] 1 AMR 975, [1998] 1 MLJ 89, [1997] 2 MLRA 63

17. [2000] 4 CLJ 621, [2000] 4 AMR 3901, [2000] 6 MLJ 454, [2000] 1 MLRH 748